

Bareboat Charter Registry

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The purpose of this article is to establish the concept of the bareboat charter registry and draw attention to a few significant international conventions that govern certain aspects of the bareboat charter registry. Also, the purpose is to present models which various countries apply to regulate the registration of vessels during the bareboat charter and analyse the contents of the provisions of the bareboat charter that regulate the relations between the contracting parties who wish to have the vessel registered in the bareboat charter registry. BIMCO's Standard Bareboat Charter, also known under the code name BARECON 2001, will be used to lay out the provisions applicable to vessels registered in the bareboat charter registry.

KEY WORDS

- ~ Bareboat charter
- ~ Bareboat charter registry
- ~ BARECON 2001

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1. INTRODUCTION

When discussing the distinctive features of a bareboat charter which warrant its separation from other modes of use of maritime vessels, among other things to be listed one certainly must mention the bareboat charter register. The bareboat charter register is a particularly significant phenomenon in maritime law, primarily when it comes to regulations on the registration of vessels. However, it does suffer from a lack of certainty when it comes to its legal nature and interpretation.

Bearing that in mind, this paper (which is first and foremost descriptive) aims at establishing the legal nature of the concept of bareboat charter register. For that purpose, this paper will outline the provisions of several maritime conventions that govern certain aspects of the registers in question, describe the models that various countries use to regulate the registration of chartered vessels in the bareboat charter register, and ultimately analyse the bareboat charter provisions which regulate the relations between the contracting parties at the registration of the vessel in the bareboat charter register. That part starts with the practice and "unique" use of standard contract forms that facilitate legal transactions between contracting parties. One such form is the Standard Bareboat Charter, known under the code name BARECON 2001,¹ issued by Baltic and International Maritime Council (BIMCO). Part V of the said form contains provisions under the heading Provisions to apply for vessels registered in a bareboat charter registry, which we will analyse in full in order to determine whether they meet the needs of the contracting parties who wish to regulate their relations. However, the complex matter of bareboat charter register can be grasped

1. BARECON 2001 is available in its entirety on BIMCO web site: https://www.bimco.org/~media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_BARECON_2001.ashx [accessed 10 January 2016].

only if one determines the fundamental elements of a bareboat charter, which we will do below.

2. MAIN FEATURES OF THE BAREBOAT CHARTER

The bareboat charter can appear as a simple contractual relation: the owner gives a vessel to the charterer to use for the performance of sea-going activity, and the charterer pays hire to the owner in consideration of the performance of the same activity. However, this contractual relation is far from simple. The complexity of this contract can be seen in the complex system of relations that arises from the provisions of the vessel for use. As we are talking about the bareboat charter, two important facts should be pointed out. First, by concluding the contract, the owner gives the vessel for use to the charterer, i.e. delivers the vessel into possession, so the charterer can use it as agreed. Second, by concluding the bareboat charter contract, the property transfers from the owner to the charterer, whereby the charterer becomes the shipoperator or, as it is called in legal literature, becomes the "maritime owner" (Brajković, 1951), i.e. "owner pro hac vice" (Tetley, 2001).

It is necessary to emphasize that it is the transfer of the possession right and the function of the operator from one contracting party to the other which forms the essence of this complex legal matter, thus increasing the importance of the bareboat charter contract as the operator is considered a complex function in the maritime law.

Standard Bareboat Charter, code name BARECON 2001, the last bareboat charter form by the international maritime association Baltic and International Maritime Council (BIMCO), which we used as the example of the bareboat charter contract, follows in its entirety the stated main features of the contractual relation of the bareboat charter. The form BARECON 2001 contains many provisions which are used for regulation of the parties' rights and obligations. The usual provisions that regulate the relations between the parties to the bareboat charter (e.g. charter period, delivery, time for delivery, cancelling clause, hire, mortgage, insurance and repairs, etc.) are accompanied by several optional BARECON 2001 provisions: provisions to apply for newbuilding vessels only (Part III), hire/purchase agreement (Part IV) and provisions to apply for vessels registered in the bareboat charter registry (Part V). It is these special provisions that regulate the relations between the parties to the bareboat charter which we will be dealing with when outlining the concept of the bareboat charter register.

3. THE CONCEPT OF THE BAREBOAT CHARTER REGISTRY

When all the characteristics of a bareboat charter are taken into account, it is obvious that, upon the conclusion of

this contract, the ownership of the vessel is reduced to a matter of marginal importance, whereas its economic exploitation becomes increasingly relevant.² The State which keeps the original register of vessels and issues title certificates has little control over the chartered vessel or no interest in it. In such cases, the vessel's link with the charterer's State becomes more relevant than the vessel's link with the owner's State. That is particularly evident in cases in which the charterer's State is ready, willing and able to exercise jurisdiction over such vessels. In the eyes of the law, the charterer's position has been regarded as important to such extent that the term *charterer's nationality* has been gaining ground as a counterbalance to the term *owner's nationality* (Tomljenović, 1998). Consequently, the distinction and the difference between the flag and the nationality of the vessel have been more pronounced lately, reinforcing the position that the vessel need not navigate under the flag of the State of registration, but is rather granted a temporary authorisation to fly the flag of the charterer's State (Tomljenović, 2005). The right of the vessel to navigate under the charterer's flag can be exercised upon the vessel's registration in the bareboat charter register.

In the context of legal developments regarding the registration of vessels, the concept of a bareboat charter register, also known as a *parallel* or *dual* register (Coles and Watt, 2002; Ademuni, 2005, 1997; Currie, 1989; Casino, 1989), is both significant and controversial (Tomljenović, 2005). Some countries responded to the chartered vessel phenomenon by amending their legislation to allow the vessel to fly the *ad hoc* flag of the charterer's State (Tomljenović, 2000). The vessel remains registered in the underlying register, but is flying the flag of the charterer (the disponent owner), based on the entry in the bareboat charter register (Tetley, 1994, p. 217; Ademuni, 1998). The vessel that is registered in the bareboat charter register is not removed from the underlying register, but temporarily "frozen", and the legal effect of the registration in the underlying registry is fully reinstated once the charter is terminated. At this point it should be noted that the vessel registered in the bareboat charter registry is not stripped of its nationality during that period. However, in terms of documents and events on board the vessel, it is subject to the State that keeps the bareboat charter registry.

The literature uses the terms *parallel* or *dual* to describe the bareboat charter register, and some authors think that this is the very reason why the legal nature of registration of the vessel in the bareboat charter register might seem confusing. What is more, the terms *parallel* and *dual* might imply that the vessel is subject to two separate jurisdictions and that it holds more than one nationality. Some authors go so far as to state that the term

2. Introducing the distinction between property rights and the rights to use and operate the vessel resulted in a separation between the regulations on the rights in rem and the regulations on the use of vessel, whereby the vessel's elements are qualified either as "static" (rights in rem pertaining to the vessel) or "dynamic" (operation of the vessel) (Tomljenović, 1998, p. 251).

dual should not be used at all in reference to the register. They believe that this term means that the vessel has a number of rights and obligations in both countries and that it entitles the charterer to choose at will which flag to fly (Argüello, 2011).

The bareboat charter register is certainly not meant to “duplicate” the vessel’s registration because that would violate the international regulations (Argüello, 2011). Namely, Article 6 of the Convention on the High Seas of 1958 and Article 92 of the United Nations Convention on the Law of the Sea of 1982 stipulate that a vessel which sails under the flags of two or more States may be assimilated to a ship without nationality.³

Certain aspects of the bareboat charter register were supposed to be regulated by the United Nations Convention on Conditions for Registration of Ships.⁴ However, that document never came into force.⁵ Under Article 12(1) of the Convention of 1986, a State may grant registration and the right to fly its flag to a ship bareboat chartered-in by a charterer in that State, for the period of that charter.

The International Convention on Maritime Liens and Mortgages of 1993 bears greater relevance for the bareboat charter register; its Article 16 contains provisions on the temporary change of flag, the consequences it produces and the changes in mortgages and other registered charges.

A reference to “the State in which the vessel is registered” or to the “State of registration” found in the International Convention on Maritime Liens and Mortgages of 1993 signifies the State in which the vessel was registered immediately prior to the change of flag (Art. 16(a) of the Convention of 1993). This Convention is important in the part where it stipulates that the State of registration, or more precisely *the law of the State of registration*, is determinative for the purpose of recognition of registered mortgages and charges (Art 16(b) of the Convention of 1993). In other words, the law of the State of bareboat charter registration, i.e. the State whose flag the vessel is flying during the charter period, is not determinative for the purpose of recognition of registered mortgages, “hypothèques” and charges.

The State of registration shall require a cross-reference entry in its register specifying the State whose flag the vessel is permitted to fly temporarily; likewise, the State whose flag the vessel is permitted to fly temporarily shall require that a cross-reference specifying the State of registration be entered in its register (Art. 16(c) of the Convention of 1993). Under Article 16(d) of the said Convention, no State Party shall permit a vessel

registered in that State to fly temporarily the flag of another State unless all registered mortgages or charges on that vessel have been previously satisfied or the written consent of the holders of all such mortgages, “hypothèques” or charges has been obtained.

The concept of the bareboat charter registry has been embraced by both the ship operators (because it brings down the crew costs in the developed countries) and many governments which, upon introduction of the bareboat charter register, reap the benefits in the form of employment of local seamen, inflow of foreign currency and the strengthening of the national fleet. Once in place, the charter register reduces the outflow of funds which otherwise would have occurred due to a shrinking national fleet (Ademuni, 1998). Numerous legal systems allow both foreign vessels to be registered in the national charter registers (known as bareboat charter-in) and national ships to be temporarily registered in foreign charter registers (known as bareboat charter-out) (Tomljenović, 1998).

4. BAREBOAT CHARTER REGISTRY ACROSS LEGISLATION

Italian legislation provides a model for bareboat charter-in and bareboat charter-out. Namely, Italy amended the Maritime Code of 1942 (Act 234 of 14 June 1989), and thereby established a special register for chartered vessels (*registro speciale*). Its purpose is the registration of the vessels that have previously been registered in foreign registers (*registro sostanziale*). For such registration one needs, among other things, a certificate issued by the State of original registration; once the vessel is registered in the Italian special register, the chartered vessel will temporarily be deprived of the right to fly the flag of the State of original registration. The registration in the Italian special register entitles the vessel to temporarily fly the Italian flag, but the vessel retains the nationality of the State that keeps the original register (*registro sostanziale*).

The English law provides for a bareboat charter register in its Merchant Shipping Act of 1995.⁶ The English law differs from the Italian insofar as it only allows bareboat charter-in, and not bareboat charter-out. Article 17, bearing the heading *Ships bareboat chartered in by British charterers*, is important because it grants the right of registration in the bareboat charter register to the vessel chartered by the English charterer and also grants the right to fly the English flag to the vessel that is registered in the national charter register (Davis, 2005). The English law explicitly stipulates that the law of the country of original registration governs the property law relations pertaining to the chartered vessel (e.g. title, mortgage, etc.) (Art. 17(7) of the *Merchant Shipping Act* of 1995).

3. For the Convention on the High Seas refer to *Narodne novine [official gazette of the Republic of Croatia] – Međunarodni ugovori*, 12/94; for the United Nations Convention on the Law of the Sea refer to *Narodne novine – Međunarodni ugovori*, 9/00.

4. The Convention is available on: http://unctad.org/en/PublicationsLibrary/tdrsconf23_en.pdf [accessed 23 February 2016].

5. It has been stated that the Convention remained “a dead letter” (Kološ, 2010, p. 54-55).

6. Merchant Shipping Act is available on: <http://www.legislation.gov.uk/ukpga/1995/21/contents> [accessed 15 January 2016].

Some legal systems, such as French and Norwegian, neither prohibit nor specifically regulate the temporary suspension of vessels from the national register in case a foreign charterer is a party to the bareboat charter. Likewise, they neither prohibit nor specifically regulate the registration of a foreign vessel in the special national register in case a French/Norwegian charterer is a party to the bareboat charter (Ademuni, 1998).

5. REGISTRATION OF VESSELS IN THE BAREBOAT CHARTER REGISTER UNDER BARECON 2001

In view of the concept of the bareboat charter register, we will now specify the BARECON 2001 provisions that apply to the registration of vessels in the special national bareboat charter.

Part V of BARECON 2001 form, titled *Provisions to apply for Vessels registered in a Bareboat charter registry*, contains only three sections: *Definitions*, *Mortgage* and *Termination of Charter by Default*.

For the purposes of the application of the provisions of Part V of BARECON 2001, Article 1 defines the terms *Bareboat Charter Registry* and *Underlying Registry*. Bareboat Charter Registry means the registry of the State whose flag the vessel will fly and in which the charterer is registered as the bareboat charterer during the period of the bareboat charter. *Underlying Registry* means the registry of the state in which the owners of the vessel are registered as owners and to which jurisdiction and control the vessel will revert upon termination of the bareboat charter registration (BARECON 2001, Part V, Art. 1).

This part of BARECON 2001 also provides for mortgages. Namely, Article 2 of Part V refers to the application of Article 12(b) of Part II, which governs the legal relations of the contracting parties where there is a mortgage registered on the vessel. Under Article 12(b) of Part II, the owner warrants to the charterer that they have not effected any mortgage(s) other than stated in the charter in the box in Part I of the form. The provision of Article 12(b) of Part II states that the owners will not effect any mortgage(s) without the prior consent of the charterers, which must not be unreasonably withheld.

If the owner defaults in the payment of any amounts due under the mortgage(s), under BARECON 2001, the charterer may deregister the vessel from the bareboat charter register and terminate the charter without prejudice to any other claim that he may have against the owner (BARECON 2001, Part V, Art. 3).

6. CONCLUSIONS

The right of the vessel to navigate under the charterer's flag can be exercised upon the vessel's registration in the special national bareboat charter register. In other words, the chartered

vessel will not fly its national flag, but the flag it is authorised to fly temporarily, i.e. the flag of the State of the charterer who is the disponent owner of the chartered vessel. It is important to note that the vessel remains registered in the original, underlying register, which means that it is not deregistered from the underlying register, but rather temporarily suspended, and will remain so for as long as it is registered in the bareboat charter register of the charterer's State.

Furthermore, the vessel registered in the bareboat charter register is not stripped of its nationality during that period. However, in terms of documents and events on board the vessel, it is subject to the State that keeps the bareboat charter register.

This specific concept of maritime law is in some aspects governed by the International Convention on Maritime Liens and Mortgages. Namely, when it comes to the recognition of registered mortgages and charges on the chartered vessel, the provisions of the said Convention explicitly stipulate that it is the law of the State of original registration, not the State of the charter registration, that is determinative for the purpose of recognition of registered mortgages, "hypothèques" and charges. International convention that was supposed to regulate the most important aspects of the bareboat charter registers never came into force. Now, there is a marked absence of a unifying instrument that would regulate the said concept comprehensively and at international level.

On the other hand, a mention should be made of the Italian and English law and their respective maritime codes which establish and regulate the concept of a bareboat charter register. The Italian law is particularly interesting because it provides both for bareboat charter – in and bareboat charter – out models, unlike the English law that only provides for bareboat charter – out model.

Finally, BARECON 2001 has been selected to outline the provisions governing the relations between contracting parties who wish to have the vessel registered in the bareboat charter register. In that respect, we can state that BARECON 2001 template pays special attention to the mortgages on the vessel. It stipulates, *inter alia*, that if the owner defaults in the payment of any amounts due under the mortgage(s), the charterer may deregister the vessel from the bareboat charter register and terminate the charter without prejudice to any other claim that he may have against the owner. Even though there are not many BARECON 2001 provisions that regulate the relations between the contracting parties who wish to register the vessel in the bareboat charter register, we should have no cause for dissatisfaction. The provisions available in the template are sufficient for the regulation of the relations between the contracting parties who wish to have the vessel registered in the bareboat charter register, and we therefore find them useful.

REFERENCES

Argüello Moncayo, M. G., (2011), Bareboat Charter Registration: A Practice in the Maritime World that is Aimed to Stay, Lund University, available at: http://year2012reviews.traconference.eu/author/download?id_paper=126&id_file=2, [accessed 14 January 2016].

Ademuni, O., (2005), An Examination of Bareboat Charter Registries and Flag of Convenience Registries in International Law, *Ocean Development and International Law*, 36(4), pp. 339-362., <http://dx.doi.org/10.1080/00908320500308726>

Ademuni, O., (1998), Bareboat Charter (Ship) Registration, Hague-London-Boston: Kluwer Law International.

Ademuni, O., (1997), The National and International Legal Regime of Bareboat Charter Registrations, *Ocean Development and International Law*, 28(4), pp. 329-367., <http://dx.doi.org/10.1080/00908329709546109>

Brajković, V., (1951), Problem brodara i njegove odgovornosti de iure condendo, Zbornik rasprava Ugovori o iskorišćavanju brodova na moru, Zagreb: Jugoslavenska akademija znanosti i umjetnosti.

Casino C., (1989), Osservazioni in tema – Bareboat Charter Registration Nazionalità e bandiera della nave nella legge, *Diritto Marittimo*, 91 (1989), pp. 379-414.

Coles, R. and Watt, E., (2002), Ship Registration: Law and Practice, London: Informa.

Currie, P. J., (1989), Registration of Ship Under Bareboat Charter with Particular Reference to Dual Registration, *Diritto Marittimo*, 91 (1989), pp. 415-427.

Davis, M., (2005), Bareboat Charters, 2nd ed, London-Singapur: LLP.

Kološ, S., (2010), Zastava pogodnosti i njihov utjecaj u međunarodnom pomorstvu, *Pravnik*, Zagreb, 44(1), pp. 51-69.

Tetley, W., (1994), *International Conflict of Laws*, Montreal: Blais.

Tetley, W., (2002), *International Maritime and Admiralty Law*, International Shipping Publication, Éditions Y. Blais.

Tomljenović, V., (2005), Odredbe Pomorskog zakonika o mjerodavnom pravu i nadležnosti sudova RH, Zbornik radova sa znanstvenog savjetovanja 'Pomorski zakonik Republike Hrvatske i druge novine iz područja pomorskog i prometnog prava', Rijeka, pp. 163-187.

Tomljenović, V., (1998), Pomorsko međunarodno privatno pravo, Izvanugovorna odgovornost za štetu i problemi izbora mjerodavnog prava, Rijeka: Pravni fakultet u Rijeci, pp. 251-254.

Tomljenović, V., (2000), Zastave pogodnosti i njihov utjecaj u modernom pomorstvu, Paneuropski pomorski simpozij (The Paneuropean Shipping Conference), Split, April 6-7, pp. 203-220.

Convention on the High Seas, (1994), *Narodne novine – Međunarodni ugovori*, 12(1994).

The United Nations Convention on the Law of the Sea, (2000), *Narodne novine – Međunarodni ugovori*, 9(2000).

Merchant Shippig Act, (1995) available at: <http://www.legislation.gov.uk/ukpga/1995/21/contents> [accessed 15 January 2016].

United Nations Convention on Conditions for Registration of Ships, (1986), available at: http://unctad.org/en/PublicationsLibrary/tdrsconf23_en.pdf [accessed 23 February 2016].

BIMCO Standard Bareboat Charter, BARECON 2001, (2001), available at: http://www.bimco.org/~media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_BARECON_2001.ashx [accessed 10 January 2016].